Testimony on behalf of the
National Association of Regulatory Utility Commissioners (NARUC)

by

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before the

United States House of Representatives
Energy and Commerce Committee
Subcommittee on Communications and Technology

hearing on

Reforming Federal Communications Commission Process

June 22, 2011

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Chairman Walden, Ranking Member Eshoo, and members of the Subcommittee, thank you for the opportunity to testify today on Federal Communications Commission (FCC) Process Reform.

I am Brad Ramsay, the General Counsel of the National Association of Regulatory Utility Commissioners (NARUC). It is – like Congress – a bipartisan organization. NARUC's members include public utility commissioners in all your States, the District of Columbia and U.S. territories with jurisdiction over telecommunications, electricity, natural gas, water and other utilities. The people I represent are the in-State experts on the impact of FCC regulation in your State and on your constituents. They, like you, worry about the impact of FCC initiatives on your constituents. I have spent the last 20 plus years representing NARUC on, among other things, telecommunications issues. I spend a great deal of time at the FCC. I am staff to every joint board and conference and support several NARUC commissioners serving on several FCC federal advisory committees.

Let me begin by sincerely thanking you for circulating the *Discussion Draft* and holding this hearing. There is no question that reform is needed. There is no question this draft includes process reforms that will significantly increase transparency and guarantee the FCC compiles a better record for decisions. NARUC has already specifically endorsed several of the changes suggested in the *Draft*. We have not however, taken positions on every section. Moreover, there are a few simple needed reforms NARUC supports that are not included. Nonetheless, the *Draft* provides an excellent starting point for a bipartisan bill that could pass in this Congress.

NARUC will help any way we can.

As one respected law professor put it in 2009:

> For years, the agency tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public. Of late, however, concerns about how the agency operates have become more pronounced and Congress has finally taken an interest in the question of … how to reform the FCC's institutional processes.[1]

Most would agree that the agency has made considerable progress since that time, but several of the organic changes the *Draft* proposes to the FCC's enabling statute will assure there is no backsliding and other changes further improve the agency's procedures.

Even if Congress is only able to pass the provisions NARUC has specifically endorsed, that alone will result in a more transparent and efficient process, and ultimately better and more informed decisions more likely to survive judicial review. That, in turn, can only result in better oversight, more competition, and new and improved services and service quality for consumers.

NARUC has well-established positions on several of the proposals. This testimony attempts to take them in the order they appear in the *Draft*.

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[1] See, Weiser, Philip J., *FCC Reform and the Future of Telecommunications Policy*, at 1, (January 5, 2009), ("*FCC Reform*") at: http://fcc-reform.org/f/fccref/weiser-20090105.pdf. Professor Weiser was tapped by the Administration to work on, *inter alia*, smart grid policy for the White House. Recently, he left the White House to return to the University of Colorado as its dean. Cf. Abernathy, Kathleen, *Managing the FCC: Style, Substance, and Institutional Reform* (January 5, 2009) available online at: http://fcc-reform.org/response/managing-fcc-style-substance-and-institutional-reform and Marcus, Michael, *Comments on Weiser's "FCC Reform and the Future of Telecommunications Policy*", at: http://fcc-reform.org/response/comments-and-observations-weisers-fcc-reform-and-future-telecommunications-policy

PROPOSED RULE MAKING REQUIREMENTS[2]

Many agency observers, including NARUC,[3] have long recognized the problems with the FCC's rulemakings. Professor Weiser, in the earlier cited *FCC Reform* article, at 16-17, explained the problem this way:

> In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include "a description of the subjects or issues involved."[] Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation. {footnote omitted}

Section 5A(a) suggests the correct solution to this problem, one specifically endorsed by NARUC as early as 2008, that the FCC must seek comment on the specific language of the proposed rule or modification.

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[2] Congress may wish to consider, in this context, that the FCC often issues orders in non-rulemaking proceedings that have broad applicability. The agency's rules recognize the fairness issues – and the opportunities for creating a better record for decisions in a note to 47 C.F.R. § 1.1208 stating: in such cases "the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings."

[3] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6, available online at: http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf. ("Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This ***revives*** an earlier FCC practice of publishing a "Tentative Decision" prior to the adoption of final rules. The benefits are obvious. *The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions*.")

This, in turn, logically requires there also be "certain prior" proceedings.[4]

Significantly, the section also requires a minimum of 30 days for stakeholders to comment on a proposal and 30 days to reply to others comments. Though it will require the FCC to manage its proceedings more carefully, this is a crucial improvement over the current process - an improvement that insures the FCC has a more complete record prior to making a decision. Indeed, often NARUC's State member commissions – *who frequently are among the best positioned to provide useful and relevant input* - cannot get comments drafted and approved in time to make shorter deadlines. By establishing a minimum 30 day comment time frame, Congress would be tilting the FCC process in favor of better and more complete records as a basis for FCC decisions. Shortchanging the development of the record can only lead to less informed decisions.

Statutory deadlines make it easier to plan comment cycles. The only time problems might arise is when the FCC wishes to base its decision on some late filed submission or report – which because of a looming statutory deadline has not been subject to in-depth critiques by other interested stakeholders.

This is not a hypothetical concern. In several forbearance proceedings, petitioners filed data that purportedly supported their petitions very close to the statutory deadline. Such action effectively eliminated the opportunity for any opposition or real analysis.

Indeed, NARUC passed a resolution in 2008 seeking revisions to the FCC's existing forbearance procedures to assure that States have a realistic opportunity to

[4] NARUC has not taken a position on whether performance measures should be included in any final rulemaking that imposes a burden on consumers or industry – but, on its face, such a proposal would require the agency to focus on the actual impact of any proposed rule and determine if it is likely to have a beneficial impact.

participate and comment on data provided in such circumstances.[5] The FCC arguably handled the issue in that proceeding. However, the *Discussion Draft* eliminates this concern prospectively vis-à-vis any other deadlines by requiring, in a subsequent section - Section 5A (e) - that the FCC cannot "rely, in any order, decision, report, or action, on— (1) a statistical report or report to Congress, unless the Commission has made such report available for comment for 30-days period prior to adoption or (2) an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing."

Emergencies do, however, arise where there is no time for either extended notice or comments. The FCC should retain some authority to act in exigent circumstances.[6]

Finally, Section 5A(a) requires for rules that impose a burden or costs - that the FCC do three things (1) identify and analyze "the market failure and actual harm to consumers that the adoption, modification, or deletion will prevent," (2) conduct "a cost-benefit analysis of the adopted rule or the modification or deletion of an existing rule; and (3) include "performance measures for evaluating the effectiveness of the adopted rule or the modification or deletion of an existing rule."

NARUC has not taken any position on these three interrelated analytical requirements. However, all regulations impose some costs,[7] and some type of weighing

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[5] To address this problem, NARUC asked the FCC to require forbearance petitioners to file "complete" petitions before the statutory shot clock starts to help ensure that all parties have a fair opportunity to thoroughly review and present their views to the Commission. On August 6, 2009, the FCC did so.

[6] Presumably the FCC would retain the authority in 5 U.S.C. § 553(b)(3)(B) to omit notice and public procedures "when the agency for good cause finds" it is "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. § 553(b)(3)(B), online at: http://www.archives.gov/federal-register/laws/administrative-procedure/553.html. But some clarification might be useful.

of the relative costs and benefits is the *sine qua non* of both agency oversight and reasoned decision making. Such an approach, has been supported by all of our recent Presidents via various Executive Orders[8] the most recent released by the current Administration last January.[9]

It is never a simple task to complete such an analysis. Most of the costs and benefits come during and after the rule is adopted – which necessarily allows only imprecise, speculative measurement.

Still, logically, an analysis of a rule's potential benefits and costs, as well as milestones for its review, could focus available resources and expertise on the efficacy of any proposed rule.

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[7] On April 1, 2011, the Office of Management and Budget announced its 14th annual Report to Congress on the Benefits and Costs of Federal Regulations at 76 Federal Register 18260 (April 1, 2011) - online at: http://edocket.access.gpo.gov/2011/pdf/2011-7504.pdf. The document does a cost-benefits analysis and claims regulatory benefits between $136 and $651 billion and total costs of $44 to $62 billion. A draft of the report is available at: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/. Other estimates of the cost side are higher. See, e.g., *The Impact of Regulatory Costs on Small Firms* by Nicole V. Crain and W. Mark Crain Lafayette College Easton, PA (September 2010) developed under a contract with the Small Business Administration, Office of Advocacy, available online at: http://archive.sba.gov/advo/research/rs371tot.pdf , which claims the annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008.

[8] See, e.g., Executive Order No. 12291, 3 C.F.R. 127 (1982) (Reagan's executive order requiring the benefits of regulation to outweigh the costs); Executive Order No. 12498, 50 C.F.R. 1036 (1985) (Reagan's executive order requiring OMB review of all new regulations); Exec. Order No. 12866, 3 C.F.R. 638 (1994)(Clinton's executive order requiring regulatory review and agency determination that regulatory benefits justify its costs). President George W. Bush issued Executive Order 13,422, 72 Federal Register 2763 (January 23, 2007) amending Executive Order 12,866, which, *inter alia*, required agencies to "identify in writing the specific market failure (such as externalities, market power, or lack of information) or other specific problem that it intends to address..to enable assessment of whether any new regulation is warranted."), available online at: http://edocket.access.gpo.gov/2007/pdf/07-293.pdf.

[9] See, Executive Order 13563, *Improving Regulation and Regulatory Review* (January 18, 2011) , published at 76 Federal Register 3821 (January 21, 2011), (Obama's order specifically notes "each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives. . ."). This order is also available online at: http://edocket.access.gpo.gov/2011/pdf/2011-1385.pdf.

COMMISSIONER COLLABORATION

The next three sections of the *Discussion Draft*, Sections 5A (b), (c) and (d), all cover necessary pre-requisites for efficient Commissioner interactions.

Section 5A (b) contains a series of measures that assure the Chairman of the agency cannot disadvantage or withhold critical information from his/her fellow commissioners. NARUC has specifically endorsed giving FCC Commissioners a minimum of 30 days to review the record of a proposed rulemaking or order. This is consistent with the *Draft's* twin requirements to assure all FCC Commissioners have adequate time to review a proposed rulemaking, including the actual text of a draft order, as well as knowledge of options available to resolve a particular proceeding.

No one can expect any Commissioner to do their sworn duty without adequate time to review proposed orders and the records that supports them. This *should* not be an issue. However, whether accurately or not, the Chairs of the FCC,[10] as well as other agencies,[11] have – from time to time – been accused of using process to limit information about particular proceedings and/or otherwise prevent other commissioners from effectively fulfilling their statutory responsibilities. The Section 5A(b) requirements should diminish these concerns.

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[10] See, e.g., *Committee on Energy and Commerce Majority Staff Report, Deception and Distrust: The Federal Communications Commission Under Chairman Martin* (December 2008).

[11] Compare, e.g., *Memorandum to NRC Chairman Jaczko from Hubert T. Bell, NRC Inspector General on the NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository Lincense Application* (OIG Case No. 11-05) (June 6, 2011), addressing, *inter alia*, concerns about whether the Chairman's "control of information prevents the other commissioners from effectively fulfilling their statutory responsibility to address policy matters."

Section 5A (c) is a modified version of standalone bipartisan legislation sponsored by Representatives Eshoo, Shimkus and Doyle - the *FCC Collaboration Act (H.R. 1009).* This section of the *Draft* corrects systemic problems with the so-called "Sunshine laws" that induce significant inefficiencies and delay in FCC administrative process. NARUC has already publicly endorsed H.R. 1009 (with one modification) and has supported some of the concepts incorporated in this section of the *Draft* since 2004.[12]

In a December 12, 2008 Letter to the current Administration's Transition Team,[13] NARUC urged the Administration to press for substantial and broad modification of the so-called Sunshine rules that are the focus of this section. Specifically, there, among a laundry list of other much needed FCC reforms, NARUC argued:

> Efficiency – Sunshine Rules: *Drop the Artifice and require face-to-face Commissioner Negotiations . . . lift the sunshine rules for face-to-face FCC commissioner negotiations.* The current "Sunshine rules" do not prevent decisions from being made out of the sunshine of public scrutiny. The Commissioners decide and usually have their dissents and concurrences prepared before the public meetings - which is more often a stylized Kabuki theatre rather than an actual decision-making session. The Sunshine rules simply put more authority in the hands of expert staff and drags out the negotiation process. This is horrifically inefficient.

As long as any formal vote occurs in an open meeting, the *Discussion Draft* allows negotiations among principals (the FCC Commissioners) – not just their delegates. This is a significant and much needed improvement to the current process and we support it. But this *Draft* also deftly handles a related problem that arises in the context of Joint Board deliberations.

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[12] See *Resolution on Federal Restrictions Affecting FCC Commissioner Participation on Joint Boards* (March 10, 2004), at: http://www.naruc.org/Resolutions/participation_jointboards04.pdf.

[13] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

To take advantage of the expertise and insight of State Commissioners on certain key issues, Congress requires joint FCC-State deliberative bodies. These so-called "joint boards", charged by Congress with the responsibilities of a federal administrative law judge and tasked with making critical record-based recommendations on universal service,[14] advanced services,[15] and separations[16] issues, *also have FCC Commissioners as participants*. Necessarily, the incredible inefficiencies in deliberations imposed by the current law on full commission deliberations also plague the work of these Congressionally-mandated bodies. A typical joint board has four State public service Commissioners, nominated by NARUC and confirmed by the FCC, and three FCC Commissioners.

Currently, FCC Commissioners must rotate their participation during face-to-face meetings and conference calls of such Joint Boards, causing continuous inefficient repetition of prior conversations and positions. This is another area where there is bipartisan consensus that the Statute should be changed. At your last FCC oversight hearing the *Draft's* proposed sunshine amendments - particularly with respect to Joint

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[14] The FCC Federal State Joint Board on Universal Service was established in March 1996 as per the Congressional mandate found in 47 U.S.C. § 254 (1996) (The text of the law is available from the Government Printing Office website at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+47USC254. The FCC webpage on this Board is at: http://www.fcc.gov/wcb/tapd/universal_service/JointBoard/welcome.html.

[15] The FCC Federal State Joint Conference on Advanced Services was established in 1999 as part of the FCC's effort to promote deployment of high speed services, pursuant to 47 U.S.C. § 157 (Note incorporates § 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended by Pub. L. 107-110, Title X, § 1076(GG), Jan.8, 2002, 115 Stat. 2093), available at page 32 of the 2007 House edition of Title 47 of the United States Code, online at: http://uscode.house.gov/pdf/2007/2007usc47.pdf. The FCC webpage on Joint Conference on Advanced Services activity is at: http://www.fcc.gov/jointconference/headlines.html. Congress authorized its creation in 47 U.S.C. § 410(b) (1994), found online at page 220 of Title 47 referenced *supra*.

[16] The FCC Federal State Joint Board on Separations has been in operation for over 25 years. Congress authorized its creation in the 1970s in 47 U.S.C. § 410(c) (1994), found at page 220 of the copy of Title 47 found at the web address in note 3, *supra*. The FCC webpage on the Separations Joint Boards is at: http://www.fcc.gov/wcb/tapd/sep/welcome.html.

Boards and Conferences, was the focus of Commissioner Clyburn's testimony, endorsed by the other FCC Commissioners and discussed at length during the question and answer period.[17] Sunshine reform – either as a standalone measure or part of a broader proposal like this *Discussion Draft* is long overdue. This section unquestionably streamlines the FCC's decisional procedures. Its requirement for party diversity for a quorum to meet is a critical and clever additional protection of process. NARUC urges Congress to move quickly to reform this aspect of Commission operations.

Section 5A (d) of the *Draft* requires the FCC to establish specific procedures for how the FCC will handle the circumstance where the Chairman is not in the majority on a proposed decision. This circumstance does occur from time to time. During Chairman Powell's stewardship of the agency, three FCC Commissioners combined to override his proposed so-called Triennial Review Order. Chairman Powell, of course, allowed the majority to direct the staff to draft the decision for review by the full Commission. NARUC supported that process.

Having rules in place for exactly how this process will work in the future will not only streamline the drafting process the next time it occurs, it also should be welcomed by FCC staff as a clear guide for their fiduciary responsibilities in such circumstances.

[17] Testimony of FCC Commissioner Mignon Clyburn before the House Subcommittee on Communications and Technology, (May 13, 2011), available online at: http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Clyburn.pdf

Transparency and Assuring FCC Action in Pending Proceedings

The next four sections – (f), (g) (h) and (i) all are laudable procedural vehicles to (1) assure that orders do not languish at the agency and (2) allow all stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has, again, specifically endorsed many of these suggestions.

Indeed, in the earlier referenced December 2008 letter to this Administration's Transition team, NARUC specified that:

> The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to "act" on USF Joint Board recommended decisions within one year.

Setting some deadlines for each type of proceeding by rule is a good idea – as the *Draft* specifies in Section 5A(g). But the *Draft* goes further. It also includes provisions that ratchet up pressure for the FCC to meet those deadlines. This includes the requirements in Section 5A(i) to report to Congress on the FCC's success with meeting deadlines as well as the associated requirements in Section 5A (f) for public reports to show the current status of all items on circulation. NARUC also specifically endorsed this last requirement because it not only puts pressure on the FCC to act on circulated items, but it also "gives interested parties notice that some action in a particular docket is imminent." [18]

[18] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

NARUC also specifically endorsed requiring the FCC to release decisions within a set time after the last Commissioner votes on the item. We did, however, suggest a slightly longer time frame – 30 days.

I have, as requested, focused this testimony on the *Discussion Draft* and referenced NARUC's explicit support for a number of provisions and its implied support for others. There are, however, in NARUC's view, other issues Congress should address as part of any reform proposal. One of the more obvious is embodied in the recently introduced bipartisan *FCC Commissioners' Technical Resource Enhancement Act* (H.R. 2102). The bill allows each FCC Commissioner to appoint to its staff an engineer or computer science professional to provide expert counsel on technical matters before the agency. NARUC passed a resolution on this precise point in February 2009, which, among other things, points out that proposed rulemakings and orders have demonstrated that the Commission needs enhanced capabilities in certain functions such as finance and engineering.

NARUC and its members are committed to working with you to improve process and procedure at the FCC. We look forward to future opportunities to provide input on these issues. Please do not hesitate to contact me or NARUC's Legislative Director for Telecommunications, Brian O'Hara if you have any questions about NARUC's position on this draft.